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McAFEE, INC., a Delaware corporation f/k/a Network
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

McAFEE, INC., a Delaware corporation
f/k/a Network Associates, Inc., d/b/a
Network Associates, Inc.,

Plaintiff,

v.

TERRY W. DAVIS, an individual; and
DOES 1 through 10, inclusive,

Defendants.

AND RELATED COUNTERCLAIM.

Case No. C-07-03529-JW

**PLAINTIFF MCAFEE, INC.'S REPLY TO
OPPOSITION TO MOTION TO DISMISS
COUNTERCLAIM**

[F.R.C.P. 12(B)(6)]

Hearing:

Date: November 5 2007
Time: 9:00 a.m.
Judge: Honorable James Ware
Dept.: 8

I. INTRODUCTION

Defendant Terry W. Davis' ("Davis") 1½ page Opposition to Plaintiff McAfee, Inc.'s ("McAfee") Motion to Dismiss is not only untimely (it was filed three days after the filing deadline),¹ but it also is legally untenable.

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¹ Under Local Rule 7-3(a), Davis was required to file the Opposition no later than 21 days before the November 5, 2007 hearing on the Motion, or by October 15, 2007. However, Davis failed to comply with Rule 7-3(a) and filed his Opposition three days late on October 18, 2007.

Davis insists that his Breach of Contract Counterclaim is not time-barred because it is governed by California Commercial Code Section 3118 (six year statute of limitation for breach of promissory note), rather than by California Code of Civil Procedure Section 337 (four-year statute of limitation for breach of written contract). Davis argues that Commercial Code Section 3118 should apply because the subject of his Breach of Contract Counterclaim – the parties’ written “Sabbatical Contract” dated February 15, 2002 – pertains, in part, to the loaned funds that McAfee is suing to recover in this breach of promissory note case. While the Sabbatical Contract (which was attached as Exhibit A to the Counterclaim) does include one provision relating to McAfee’s loan to Davis, it clearly is neither a promissory note nor any other type of negotiable instrument (the precondition to the application of Commercial Code Section 3118). The Sabbatical Contract is just an ordinary written agreement between an employee and his employer. As such, it is governed by Code of Civil Procedure Section 337, not Commercial Code Section 3118.

Davis’ “Breach of Contract Counterclaim” is time-barred under Section 337’s four-year statute of limitation because Davis waited until July 30, 2007 – more than five years after the purported breach and more than one year after the expiration of the statute of limitation – to assert the Counterclaim in his Answer to McAfee’s Complaint. McAfee therefore requests that the Court grant its Rule 12(b)(6) Motion and dismiss Davis’ Counterclaim with prejudice.

II. DAVIS HAS FAILED TO OVERCOME MCAFEE’S SHOWING THAT HIS PURPORTED “BREACH OF CONTRACT COUNTERCLAIM” IS TIME-BARRED UNDER CODE OF CIVIL PROCEDURE SECTION 337

McAfee brought this Motion to Dismiss because it was clear – based on Davis’ own allegations – that his “Counterclaim for Breach of Contract” was time-barred under Code of Civil Procedure Section 337. California Code of Civil Procedure Section 337 provides a four-year limitations period for “[a]n action upon any contract, obligation or liability founded upon an instrument in writing.” *Cal. Civ. Proc. Code § 337*. A breach of contract claim accrues “at the time of the breach of contract, and the statute of limitations begins to run at that time regardless of whether any damage is apparent or whether the injured party is aware of his right to sue.” *Perez-Encinas v. AmerUs Life Ins. Co.*, 468 F.Supp.2d 1127, 1135 (N.D. Cal. 2006). Davis alleged in

1 Paragraph 1 of the Counterclaim that he entered into a written "Sabbatical Contract" with
2 McAfee on February 15, 2002. (Counterclaim at ¶ 1.) He further alleged in Paragraph 5 that
3 McAfee breached the Sabbatical Contract on April 24, 2002. (*Id.* at ¶ 5.) Despite Davis'
4 knowledge of these facts, Davis failed to bring his breach of contract claim against McAfee until
5 July 30, 2007, over five years after April 24, 2002 (the date of the alleged breach) and more than
6 one year after April 24, 2006 (the date on which Section 337's four-year statute of limitation
7 expired).

8 Davis insists that his "Breach of Contract Counterclaim" is not time-barred
9 because it is governed by California Commercial Code Section 3118 (six year statute of limitation
10 for breach of promissory note) and not Code of Civil Procedure Section 337 (four-year statute of
11 limitation for breach of written contract). Davis appears to offer two theories for why this should
12 be the case. Neither of them has merit.

13 First, Davis contends that the six year statute of limitation under Commercial Code
14 Section 3118 should govern his "Breach of Contract Counterclaim" because (1) Section 3118
15 governs McAfee's Breach of Promissory Note Claim against him and (2) Davis' Counterclaim
16 arises out of the same subject matter as McAfee's Claim. Davis' argument – if understood
17 correctly – is that, where a defendant's counterclaims and a plaintiff's claims relate to the same
18 subject matter, the statutes of limitation governing the counterclaims necessarily must be the
19 same as those governing the claims. (See, Opposition at page 2, lines 18-26.) In support of this
20 argument, Davis cites Code of Civil Procedure Section 428.10(b). His reliance on Section
21 428.10(b), however, is misplaced. That statute does not relate in any way to statutes of limitation.
22 It merely discusses the conditions under which defendants are permitted to bring cross-claims
23 against plaintiffs. Section 428.10(b) does not require identical statutes of limitation to be applied
24 to related claims and counterclaims. *See, Cal. Civ. Proc. Code § 428.10(b).*

25 Second, Davis argues that because the Sabbatical Contract is really a purported
26 "modification" of McAfee's promissory note (as opposed to an ordinary employment contract),
27 Commercial Code Section 3118 should apply instead of Code of Civil Procedure Section 337.
28 This argument lack merit. Commercial Code Section 3118(a)'s six year statute of limitation

1 applies only to claims arising out of breaches of promissory notes and similar negotiable
2 instruments. “[A]n action to enforce the obligation of a party to pay a note payable at a definite
3 time shall be commenced within six years after the due date or dates stated in the note.” *Cal.*
4 *Comm. Code § 3118(a)*. California Commercial Code Section 3104(a) defines a “negotiable
5 instrument” as an unconditional promise or order to pay a fixed amount of money at a specific
6 time. *Cal. Comm. Code § 3104(a)*.

7 Clearly on its face, the Sabbatical Contract is neither a promissory note nor any
8 other kind of negotiable instrument. While the Sabbatical Contract does contain a single provision
9 relating to McAfee’s loan to Davis (along with 10 other provisions that are unrelated to the loan),
10 it makes no mention of any promissory note and does not incorporate by reference the terms of
11 any promissory note. Nor does it contain an unconditional promise or order to pay a fixed
12 amount of money at a specific time. *Compare, Cadle Co. v. World Wide Hospitality Furniture,*
13 *Inc.*, 144 Cal.App.4th 504, 514, fn. 8 (2006) (holding that Section 3118(a) governed claim for
14 breach of “Change In Terms Agreement” because “like its predecessor, the Agreement is a
15 promissory note, a negotiable instrument. It establishes a payment schedule, but also provides
16 that a missed payment need not be considered a breach if the full debt is satisfied by December
17 31, 1993. Commercial Code section 3118, subdivision (a) establishes a six-year statute of
18 limitations, from the final due date, for promissory notes payable at a definite time”). The
19 Sabbatical Contract is just an ordinary employment contract. It defines the terms of an
20 employee’s sabbatical and post-sabbatical return to work. Davis seems to have been aware of this
21 fact, which is why he entitled his Counterclaim “Breach of Contract” and not “Breach of
22 Promissory Note.”

23 Davis’ characterization in his Opposition of the Sabbatical Contract as a
24 “modification” of McAfee’s promissory note is not only unsupported (Davis offers nothing more
25 than his lawyer’s personal opinion in the “Factual Background” section), but it is irrelevant for
26 the purposes of this Motion. In ruling on a Rule 12(b)(6) Motion, a court may only consider facts
27 contained within the four corners of a pleading (including any attached exhibits referenced
28 therein). *See, W. Schwarzer, A.W. Tashima & J. Wagstaffe, California Practice Guide: Federal*

1 *Civil Procedure Before Trial*, §9:205 at 9-58 (TRG 2007). A court may not consider new facts
 2 alleged for the first time in opposition papers. *See, Schneider v. California Dept. of Corrections*,
 3 151 F.3d 1194, 1197 (9th Cir. 1998).

4 Davis should not be allowed to amend his Counterclaim to allege for the first time
 5 that the Sabbatical Contract is a “modification” of McAfee’s promissory note. Any such
 6 amendment would be inconsistent both with (1) the allegations of his previously-filed pleading
 7 (i.e., in Paragraphs 1 and 5, he alleged that the Sabbatical Contract was a separate contract and
 8 that McAfee breached that contract) and (2) the terms of the Sabbatical Contract itself (Exhibit A
 9 to the Counterclaim) (which reflects on its face that it is not a negotiable instrument). *See, Hayes*
 10 *v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001) (court cannot consider new theories or facts in
 11 an opposition brief that are inconsistent with the pleadings of a complaint or cross-complaint). A
 12 party may allege new facts only if they are consistent with the challenged pleading. *See, Reddy v.*
 13 *Litton Indus., Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990). Leave to amend must be denied if the
 14 party cannot state a claim without contradicting any of the allegations of its original complaints.
 15 *Id.*; *accord, Stone v. The Travelers Corp.*, 58 F.3d 434, 437 n.1 (9th Cir. 1995).

16 Because Davis’ Counterclaim arises out of the Sabbatical Contract and not a
 17 negotiable instrument, it is governed by the four year statute of limitation under Code of Civil
 18 Procedure Section 337, not the six year statute of limitation under Commercial Code Section
 19 3118(a). Davis’ “Breach of Contract Counterclaim” is time-barred.

20 **III. CONCLUSION**

21 Based on the foregoing, this Court should grant McAfee’ Rule 12(b)(6) Motion
 22 and dismiss Davis’ Counterclaim for “Breach of Contract” with prejudice.

23 Dated: October 22, 2007

STEIN & LUBIN LLP

25 By: /s/

26 Michael F. Donner
 27 Attorneys for Plaintiff
 28 McAfee, INC., a Delaware corporation f/k/a
 Network Associates, Inc., d/b/a Network
 Associates, Inc.